

SERVED: March 25, 1993

NTSB Order No. EA-3826

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of March, 1993

_____)	
JOSEPH DEL BALZO)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11170
v.)	
)	
RICHARD L. PERRY,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on November 28, 1990, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator finding that respondent had violated 14 C.F.R. 91.75(a).² We deny the appeal.

¹The initial decision, an excerpt from the hearing transcript, is attached.

²§ 91.75(a) (now 91.123) provided, as pertinent:

(a) When an ATC [air traffic control] clearance has been

Respondent was the non-flying pilot in command of United Airlines' Boeing 747 passenger-carrying Flight 817, departing San Francisco for Honolulu on February 26, 1990. The parties do not disagree with the basic facts alleged in the complaint. Tr. at 5-13.³ Flight 817's initial clearance out of San Francisco was to climb and maintain 10,000 feet. ATC modified the clearance to 3,000 feet in light of small aircraft traffic at 3,500 feet, and later modified the heading vector as well. Respondent acknowledged both the amended clearance and the nearby Cessna. See Exhibit C-1 transcript of the tower tape.⁴ Fifty seconds after acknowledging the amended vector and more than 1 and 1/2 minutes after acknowledging the amended altitude clearance, respondent advised ATC "we're gonna rollout because of that traffic thats at ah thirty five hundred feet." Exhibit C-1 at 2. Flight 817 thereafter was tracked as high as 3,500 feet (Tr. at 25 and Exhibit C-2). ATC directed Flight 817 to maintain 3,000, respondent answered in the affirmative, and the aircraft returned

(..continued)

obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained.

The Administrator waived the proposed 30-day suspension of respondent's airline transport pilot certificate pursuant to the Aviation Safety Reporting Program.

³Two minor errors in the complaint were corrected at the hearing. Tr. at 13 and 15.

⁴Although respondent declined to admit the Administrator's allegation (Complaint, ¶ 6) that this other aircraft was a Cessna, the ATC transcript and the law juge referred to it as a Cessna, and respondent introduced no evidence to the contrary. The type of small aircraft is not critical, in any case.

to that altitude until ATC issued further instructions.

The Administrator introduced testimony from an air traffic controller who heard the discussions,⁵ and from the supervisory controller. Both testified that the amended clearance (heading 230°, altitude 3,000 feet) was common at this airport and had produced no complaints or concerns from pilots. Tr. at 47 and 66. Their testimony also indicated that the cleared altitude of 3,000 feet was considerably higher than any structures under the flight path (i.e., the Sutro tower, at 1541 feet⁶), and 200 feet above the applicable Minimum Vector Altitude (MVA).⁷

Respondent testified to his belief at the time that his action was necessary to avoid an unsafe situation. He had never before been given a 230°, 3,000-foot clearance from this airport (Tr. at 140), and he testified to his concern that following this clearance would put the aircraft between the Cessna, which was circling at 3,500 feet, and Sutro tower(s) whose lights were visible to him and which appeared to him to be higher than the aircraft.

⁵Respondent had actually communicated with an ATC trainee, who did not testify. This witness, Mr. Haegele, had been working departure control with the trainee at the time of these communications.

⁶It is not clear from the transcript whether there are one or two towers. Both the singular and plural are used by the witnesses.

⁷The MVA is an altitude used by ATC rather than pilots. This term and its relationship to other minimum altitude measures are at the heart of respondent's argument and are further discussed infra. The MVA in Sutro's immediate vicinity was 2,800 feet. In the surrounding area, it was 2,500 feet. Tr. at 70.

Respondent stated that, in reviewing the approach plate, he saw that 3,700 feet was the Minimum Safe Altitude (MSA).⁸ Respondent therefore told the crew that the 3,000-foot clearance didn't appear to be a "legal" altitude (Tr. at 122), and he directed the subsequent climb and rollout from the turn to 230° he was ordered to make. Respondent argued that it was reasonable for him to rely on the 3,700-feet MSA, especially when MVA information was not available to him.

The law judge found that respondent violated § 91.75(a). The law judge rejected respondent's explanation as incredible, concluding:

A pilot of some 30,000 plus hours . . . can't come into this proceeding and credibly maintain . . . that he does not understand the difference between minimum sector altitudes or minimum safe altitudes and minimum vectoring altitudes.

Tr. at 191. The law judge stated that respondent's explanation, even if accepted, would affect possible mitigation of the sanction, not the finding of violation itself, but that the sanction issue was moot due to the Administrator's waiver of sanction.

In his appeal, as at the hearing, respondent argues that he acted properly in taking the action he did. Allegedly, given his sincere belief that the prescribed course was not safe, and the

⁸Also called the Minimum Sector Altitude, the MSA provides the altitude necessary to clear the highest obstacle within a 25 nautical mile radius from a designated navigation facility. The Administrator notes that it applies only in case of emergency, and no emergency was declared here. We need not resolve this point.

MSA information on the departure plate used by him, the Board should excuse his conduct. He argues (Appeal at 11, emphasis in original) that the FAA has created "two different 'realities' of supposedly safe minimum altitude flight; one for pilots and one for controllers" and that he "reasonably act[ed] in reliance on conflicting or incorrect information provided by, or approved by, the government." Id. at 13. Elsewhere (Appeal at 4), respondent frames the issue as conflicting "official" information creating an implied authority to climb to the MSA. Respondent also argues that it was error, as a matter of policy and law, for the law judge to treat his explanations as relevant only to mitigation of the sanction.

We do not accept respondent's premise -- that the information was conflicting -- and we, therefore, cannot agree with arguments based on it. The law judge did not find it credible that respondent could not have known what the MSA information meant and respondent does not directly challenge that credibility finding. Nevertheless, even had respondent honestly and sincerely relied on a mistaken understanding, the finding that he violated § 91.75(a) would still stand.

If respondent's understanding was mistaken, he was substantially unaware of matters with which he should have been intimately familiar. As the duty of care of a pilot in command requires, respondent should have known, for example, that MVAs used by ATC may be below the applicable MSA. Thus, we cannot find that it was reasonable for respondent to ignore ATC

instructions and instead proceed based on his own, very limited knowledge.

Also contrary to argument presented, respondent did not rely on conflicting or incorrect information. MVA and MSA information are not conflicting if one understands the meaning and application of each. Accordingly, cases such as Administrator v. Smith, 3 NTSB 85 (1977) and Administrator v. Graves, 3 NTSB 3900 (1981), both of which involved government contributory negligence, are not on point.

That MVAs may not be available to pilots does not change our conclusion. Indeed, Exhibit R-1 (a poster respondent had seen on numerous occasions) indicates that lack of availability, and also states the possibility that the MVA may be lower than other published figures that ostensibly show obstacle-clearing altitudes.

Given respondent's professed concerns about the clearance, we are also troubled by his failure to attempt clarification of the controller's instructions. Respondent's failure to declare an emergency undermines his statement (Tr. at 129) that there was no time to seek clarification from ATC.⁹

Furthermore, respondent's failure to declare an emergency and his refusal at the hearing to argue that one had existed also seriously undermine his argument that his course of action reflected company training and policy and, for this reason, his

⁹We note, as does the Administrator, that respondent at no point advised ATC of his intention to deviate from his cleared altitude.

behavior should be excused. As the Administrator points out, United Airlines' training program encouraged questioning the controller first, if possible. Instructions to "react and solve th[e] situation first and sort out the consequences secondly"¹⁰ are clearly directed to emergency situations where such action is necessary. We need not and will not interpret the training program as encouraging pilots to second-guess ATC clearances containing low-level vectors out of high-traffic areas, especially when that second-guessing is based on very limited information and mistaken assumptions, as was the case here.¹¹ In light of our conclusions, we need not reach the question of whether the law judge was correct in holding that respondent's explanations, even if accepted, would mitigate the sanction rather than support dismissal of the complaint.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁰Tr. at 155.

¹¹Because we reject respondent's interpretation of United Airlines' policy, we find irrelevant respondent's citation to Board cases involving reasonable reliance on company procedure.